84-1490

No. 84-_____

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

LLOYD LEE NELSON,

Petitioner,

v.

PIEDMONT AVIATION, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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March 28, 1985

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QUESTION PRESENTED

Whether the court below erred in its statutory construction of the Railway Labor Act's definition of "employee"; where the lower court's interpretation, if allowed to stand, would:

— defeat the intent of Congress, and

— allow carriers to discriminate against "applicants or employment" because those applicants had previously exercised their statutory right to support or not support labor unions.

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No. 84-____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

LLOYD LEE NELSON,

Petitioner,

v.

PIEDMONT AVIATION, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner Lloyd Lee Nelson prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit in the above-entitled case.

REPORT OF THE OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 750 F.2d 1234 (4th Cir. 1984) and is reproduced as Appendix A to this petition. The unreported decision of the United States District Court for the Middle District of North Carolina is reproduced as Appendix B to this petition.

JURISDICTION

The decision of the court of appeals was entered on December 28, 1984. Jurisdiction to consider this petition is governed by the provisions of Rule 20.2 of the Revised Rules of this Court and Sections 1254(1) and 2101(c) of Title 28, United States Code. (Petition to be filed within ninety (90) days after the entry of the final judgment or decree of the Court of Appeals.)

APPLICABLE STATUTORY PROVISIONS

The statute involved is the Railway Labor Act ("RLA"), as amended, 45 U.S.C. § 151 *et seq* (1982). The relevant sections of the RLA are Section 1 *Fifth*, Section 2, Section 2 *Fourth* and *Fifth*, Section 201, and Section 202. These sections are codified as 45 U.S.C. §§ 151 *Fifth*, 151a, 152 *Fourth* and *Fifth*, 181 and 182 (1982), respectively. These sections provide in pertinent part:

RLA § 1 Fifth — The term "employee" as used herein includes every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission now in effect, and as the same may be amended or interpreted

. . . .

RLA § 2 — The purposes of the [RLA] are:

(1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as condition of employment or otherwise, of the right of employees to join a labor organization; . . . .

RLA § 2 *Fourth*

Employees shall have the right to organize and bargain collectively through representatives of their own choosing. . . . No carrier, its officers, or agents shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees . . . or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization . . . .

RLA § 2 *Fifth*

No carrier, its officers, or agents shall require any person seeking employment to sign any contract or agreement promising to join or not to join a labor organization; and if any such contract has been enforced prior

to the effective date of this chapter, then such carrier shall notify the employees by an appropriate order that such contract has been discarded and is no longer binding on them in any way.

RLA § 201

All of the provisions of [the RLA] . . . are extended to and shall cover every common carrier by air . . . and every air pilot or other person who performs any work as an employee or subordinate official of such carrier or carriers, subject to its or their continuing authority to supervise and direct the manner of rendition of his service.

RLA § 202

The duties, requirements, penalties, benefits, and privileges prescribed and established by the provisions of [the RLA] . . . shall apply to said carriers by air and their employees in the same manner and to the same extent as though such carriers and their employees were specifically included within the definition of "carrier" and "employee", respectively, in [section 1 of the RLA].

STATEMENT OF THE CASE

This is a Railway Labor Act case involving the issue of whether "applicants" for employment enjoy the protections of the statute. The petitioner, a well-qualified airline pilot, was denied employment at Piedmont Aviation, Inc. ("Piedmont") solely because Piedmont feared retaliation by the pilot's union because the petitioner had flown during the union's strike while employed at another air carrier.

This case arises out of a bitter labor dispute between the Air Line Pilots Association, International ("ALPA") and Wien Air Alaska ("Wien"), a small regional air carrier operating in the Pacific Northwest. In 1977 ALPA commenced a strike against Wien, but the airline continued to operate its aircraft by hiring replacement pilots. The petitioner was hired by Wien in 1978 and flew throughout the remainder of the strike.

This strike was to become the second longest strike in aviation history and was finally settled in January of 1979 after Congress directed the President of the United States to intervene and established an Emergency Board. Presidential Emergency Board No. 95-504. The Interim Report of the Emergency Board, which was accepted by all of the parties, restored the striking pilots to their old jobs and provided:

> Though the replacement pilots are thus displaced they remain on the Wien pilots seniority list. Assurance has been given by [Wien and ALPA] that no pilots shall be subject to discrimination, fines or harrassment, either by reason of the strike or other

> protected activities, work during the strike or service as a replacement during the strike period.
>
> As it is our recommendation that the replacements be displaced and . . . the Board recommends . . . the . . . displaced replacements be provided the monetary benefits and job opportunities with airlines other than Wien afforded protected employees displaced under the [Air Line Deregulation] Act.

Emergency Board No. 95-504 Presidential Report, 7 (1979).

Notwithstanding its assurance that it would not retaliate against the replacement pilots, ALPA published and distributed a "blacklist" of the pilots who had flown during the Wien strike. After the strike was settled, the petitioner and many other Wien replacement pilots sought employment with other airlines, including the respondent Piedmont. The petitioner's name was included on the "blacklist" and he had great difficulty obtaining employment interviews.[1]

In May of 1979, Piedmont hired one of the Wien replacement pilots, Howard Peterson, and he commenced flying scheduled flights in June 1979. On July, 19th, Piedmont responded to petitioner's application for employment and offered to fly him to Winston-Salem for an employment interview. This interview was scheduled for July 31, 1979.

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[1] There is no evidence that Piedmont was aware of the "blacklist," and Piedmont was the *only* major airline to ever hire any of the Wien pilots. However, as noted, *infra*, Piedmont subsequently discharged the Wien pilot to placate ALPA.

In the time period between the offer of an employment interview and petitioner's actual interview, ALPA discovered that Piedmont had hired Howard Peterson, one of the "blacklisted" Wien replacement pilots. ALPA officials complained to Piedmont management that the employment of a Wien "scab" was causing pilot "morale" problems and might affect the upcoming contract negotiations. Piedmont took no action. A few days after these ALPA complaints, there was a significant deterioration in the "on-time performance" of Piedmont's passenger flight operations. Piedmont officials became concerned that the pilots were conducting a "slowdown" over its hiring of a Wien replacement pilot.

The petitioner flew to Greensboro, North Carolina on July 30th for his scheduled employment interview the next day. He rode to Winston-Salem in a limousine with a uniformed Piedmont captain. They had an amicable discussion about flying for Piedmont until the captain learned that the petitioner had flown during the Wien strike. At this time he became very irate and stated that "he would do everything in his power to try and prevent him or any other Wien 'scab' from obtaining employment at Piedmont." The captain also stated that if petitioner was hired by Piedmont, "ALPA would make his life miserable."

On the following day, the petitioner had a *very* short employment interview with Piedmont's Director of Personnel who told him that "ordinarily Piedmont would be able to offer a position to a person with his experience." He added, however, that since the time that the interview had been scheduled "some things had happened so that

they were not going to be able to offer the petitioner any encouragement for employment at that time." The Director of Personnel explained that Piedmont "had already hired one Wien replacement pilot and that they were encountering problems that seemed to be related to his employment." The Director of Personnel described the problems as delays and maintenance problems which did not normally occur. Consequently, he stated that Piedmont would not commit itself to hiring any additional Wien replacement pilots.[2] Following this brief five-minute interview, the petitioner was ushered out a back door.

Although Piedmont continued to recruit and hire additional pilots, it refused to reconsider the petitioner for employment. Eventually, because of the effectiveness of the ALPA blacklist and other carriers' refusals to employ Wien pilots, the petitioner left the country and went to Saudi Arabia to find employment as an airline pilot.

The petitioner brought suit in federal district court alleging that Piedmont violated Section 2 *Fourth* of the Railway Labor Act, 45 U.S.C. § 152 *Fourth* (1982) by refusing to hire him because he was not a member of ALPA and had flown during the Wien strike. The district court granted Piedmont's motion to dismiss, holding

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[2] Three days later, Piedmont discharged the one Wien pilot it had already hired, supposedly because of the pressure of the pilot "slowdown." *See Peterson v. Air Line Pilots Association, et al.*, U.S. District Court for the Middle District of North Carolina, Civil Action No. C-80-341-WS, presently on appeal to the U.S. Court of Appeals for the Fourth Circuit, Docket No. 84-1186 (argued November 1, 1984). Piedmont is no longer a party to this litigation, having reached an out-of-court settlement with the pilot involved.

that a "mere applicant for employment" was not protected by the Act because it only applied to "employees" as defined by the statute.

The court of appeals, while acknowledging the equities of petitioner's situation, nonetheless affirmed the district court's narrow, literal interpretation of the statutory definition of "employee," holding that relief would have to come from Congress, not the courts.

REASONS FOR GRANTING THE WRIT

Although one is hard-pressed to say that the Fourth Circuit's narrow, literal interpretation of the term "employee" is clearly erroneous,[3] the petitioner submits that such an interpretation defeats the intent of Congress in enacting the Railway Labor Act. The Fourth Circuit's decision, if allowed to stand, turns back the clock some sixty years and allows carriers (employers) to discriminate against workers solely because of their union or non-union beliefs or activities. The RLA is the oldest of the many federal labor laws protecting the associational rights of workers; it would be a strange twist of fate to have it now construed to be the *only* federal labor law allowing employers to discriminate against workers for having exercised their associational rights.

The Fourth Circuit's Narrow, Literal Construction of the Statutory Definition of "Employee" Conflicts with Decisions of This Court and Other Courts of Appeal.

[3] *See* Fuller, *The Case of the Speluncean Explorers*, 62 Harv. L. Rev. 616 (1949).

Although there are no previous RLA cases discussing the employment status of "applicants for employment," there are cases which have broadly construed the RLA's statutory definition of "employee" to ensure that justice was served. For example, in *Pennsylvania R.R. v. Day*, 360 U.S. 548 (1959), this Court had to decide whether "retired" workers were still "employees" within the meaning of the Act. Justice Black, in dissent, stated:

> [s]eemingly to highlight the fact that the Act is to govern active workers only, Congress defined "employee" as "every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work defined as that of an employee . . . . " The railway engineer who brought this suit was not an employee within this definition. Prior to the suit he had resigned his job, and had claimed an annuity under the Railroad Retirement Act of 1937, which requires a worker making such a claim to relinquish all rights to return to railroad service in the future. Under these circumstances, the retired employee could not be, and was not "in the service" of the railroad or "subject to its continuing authority to supervise . . . the manner of rendition of his service."

360 U.S. at 555 (Black, J., dissenting) (footnotes omitted). Notwithstanding Justice Black's statutory argument, the Court broadly construed the statute and held that "retired" workers were employees within the meaning of the RLA. *Accord Air Line Pilots Association v. Alaska Airlines, Inc.*, 735 F.2d 328 (9th Cir. 1984).

Additionally, both the National Mediation Board and

Courts of Appeal have held that "furloughed" workers are employees within the meaning of the RLA, even though they quite obviously are not "in the service" of the carrier or "subject to its continuing authority to supervise . . . the manner of rendition of his service." *See, e.g., Nashville, C. St. L. Ry. v. Railway Employees Dept.*, 93 F.2d 340 (6th Cir.), *cert. denied*, 303 U.S. 649 (1938); *Florida East Coast Ry.*, NMB Case No. R-212 (1936); *Southern Pacific Lines*, NMB Case No. R-426 (1938) (citing *Nashville, C. St. L. Ry., supra*).[4]

Finally, it should be noted that "discharged" workers remain "employees" within the meaning of the RLA. Initially this Court held that it was up to the discharged worker whether or not he desired to be treated as an "employee" under the statute. *See Moore v. Illinois Central Ry.*, 312 U.S. 630 (1941); *Slocum v. Delaware, L. & W. R. Co.*, 339 U.S. 239 (1950). However, in 1972 the Court overruled *Moore*, holding that "discharged" workers

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[4] It should be noted that at the time Piedmont refused to hire the petitioner, he was on "furlough" from Wien and still on its Pilots' Seniority List. Thus, under the rationale of the *Nashville* case, *supra*, the petitioner was an "employee" within the meaning of the RLA. As previously noted, the Presidential Emergency Board recommended to the President of the United States that the furloughed Wien pilots be given job opportunities with other airlines and enjoy the labor protection provisions (including the first right of hire) of the Airline Deregulation Act of 1978. Thus, even if one construes the term "employee" narrowly, it is clear that the petitioner was one of the workers that the courts and the Emergency Board believed should be protected from discriminatory hiring practices.

were "employees" and had to utilize the mandatory arbitration procedures of the RLA. *Andrews v. Louisville & Nashville R.R.*, 406 U.S. 320 (1972).

Although these cases can be distinguished because—at one time or another—"furloughed," "discharged," or "retired" workers actually satisfied the literal definition of "employee," they also demonstrate that federal agencies and this Court have broadly construed the statute to carry out the intent of Congress.

There can be little doubt that Congress, when it enacted the RLA, intended to immunize workers from carrier discrimination because of the employees' union or non-union activities. It is respectfully submitted that the Fourth Circuit's narrow, literal reading of the statute frustrates the intent of Congress, while a broader construction furthers the purposes of the Act. The other protections of the statute (e.g., prohibition against "yellow dog" contracts) become meaningless if the carrier is allowed to pre-screen applicants for employment and weed out the undesirables. A writ of certiorari should issue.

A Decision by this Court is Necessary to Settle an Important Question of Law

The RLA governs the working lives of almost a million workers employed in the railway and airline industries and, in recent years, both of these industries have undergone substantial change. For example, in 1978, Congress passed the Airline Deregulation Act, opening up the airline industry to intense competition, including

the entry of many new carriers. The relatively stable transportation industries of the past are gone. If the decision of the Fourth Circuit is allowed to stand, the emerging carriers will be able to discriminate against prospective workers and deny them their legitimate right to freedom of association.

During the past one hundred years American workers struggled against great odds to obtain freedom of association (and non-association) in the work place. The decision of the Fourth Circuit, if allowed to stand, turns back the clock and provides unscrupulous carriers with a license to discriminate against workers because of their prior union or non-union activities. Like racial and sexual discrimination, discrimination based on union or non-union activities is abhorrent to the American way of life.

This case offers an excellent vehicle for the Court to definitively construe the anti-discrimination provisions of the RLA, thereby ensuring labor peace in the industries covered by the Railway Labor Act. A writ of certiorari should issue.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that a writ of certiorari should issue to review the judgment and opinion of the Fourth Circuit.

Respectfully submitted,

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March 28, 1985

APPENDICES

APPENDIX A

Decision of the
United States Court of Appeals
for the Fourth Circuit

December 28, 1984

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

LLOYD LEE NELSON, *Appellant,*	)	
v.	)	No. 84-1187
PIEDMONT AVIATION, INC., *Appellee.*	)	Argued November 1, 1984. Decided December 28, 1984.
LLOYD LEE NELSON, *Appellee,*	)	
v.	)	No. 84-1190
PIEDMONT AVIATION, INC., *Appellant.*	)	

Appeal from the United States District Court for the Middle District of North Carolina, at Winston-Salem. Eugene A. Gordon, District Judge. (C/A 82-821)

Before ERVIN and WILKINSON, Circuit Judges, and MICHAEL, United States District Judge for the Western District of Virginia, sitting by designation.

WILKINSON, Circuit Judge:

Appellant raises the question of whether an applicant for employment is an "employee" under the Railway Labor Act. The District Court for the Middle District of North Carolina held that he is not. Thus, Piedmont Aviation's alleged refusal to hire appellant because of present non-union membership and past non-union activities did not violate the RLA because that statute imposes no such restrictions on the right of a carrier to select its own employees.

Appellant points to nothing in the statutory language or legislative history of the Railway Labor Act to support his claim to its protection. He refers us to not a single case where a court has interpreted the term "employee" so expansively. Instead, he candidly invites us to participate in a creative exercise in statutory redraftsmanship. We decline that invitation and affirm the decision of the district court.

I

Appellant Lloyd Lee Nelson flew as a replacement pilot for Wien Air Alaska ("Wien") during a two-year period when the Air Line Pilots Association ("ALPA") was on strike against Wien. Subsequently, appellant sought employment with other American airlines, including appellee Piedmont Aviation, Inc. ("Piedmont"). He was granted an interview by Piedmont but was allegedly denied employment because the airline feared delays and maintenance problems if it hired a Wien replacement pilot. Appellant finally found a position in Saudi Arabia.

far from his home and family. He filed this action against Piedmont under the Railway Labor Act ("RLA"), 45 U.S.C. § 151 *et seq.* (1982), seeking damages and injunctive relief. The district court dismissed the action for lack of subject matter jurisdiction and for failure to state a claim upon which relief could be granted.

II

Nothing in the statutory language or the legislative history of the RLA (which extends to common carriers by air, 45 U.S.C. § 181) supports appellant's contention that applicants for employment are covered. The purpose of the statute is to establish the mechanics for collective bargaining between interstate carriers and their employees through freely selected representatives of both parties, *Nashville, C. &. St. L. Ry. v. Railway Employees Dept.*, 93 F.2d 340 (6th Cir.), *cert. denied*, 303 U.S. 649 (1937); *see also Virginia Ry. Co. v. System Federation No. 40*, 300 U.S. 515 (1937). The statute defines an "employee" in clear language:

> The term "employee" as used herein includes every person *in the service of a carrier* (subject to its continuing authority to supervise and direct the manner of rendition of his service) *who performs any work* defined as that of an employee or subordinate in the orders of the Interstate Commerce Commission . . . 45 U.S.C. § 151 Fifth (emphasis added).

In construing a statute, we must begin with the ordinary meaning of the words used and, absent a clearly expressed legislative intent to the contrary, regard the language as conclusive. *American Tobacco Co. v. Patter-*

son, 456 U.S. 63 (1982); *see also United States v. American Trucking Ass'n, Inc.*, 310 U.S. 534 (1940). Here the statutory language does not admit of doubt. At the time of his application to Piedmont, appellant was not "in the service of a carrier" and did not "perform any work" for an airline as specified by 45 U.S.C. § 151 Fifth. *See Nashville, C. & St. L. Ry. v. Railway Employees Dept.*, 93 F.2d 340 (6th Cir.), *cert. denied*, 303 U.S. 649 (1937). Therefore, appellant was plainly not subject to the protections of 45 U.S.C. § 151 Fourth, prohibiting an employer from interfering with an employee's free choice of whether or not to join a labor organization. The only section of the RLA that deals with prospective employees is 45 U.S.C. § 152 Fifth, prohibiting a carrier from requiring a person seeking employment to sign any agreement promising to join or not to join a labor organization. The presence of this section demonstrates Congress' ability to cover prospective employees when it wishes, and appellant makes no claim that Piedmont attempted to extract any promises from him in violation of this provision.

There are 1,381 pages of legislative history pertaining to the Railway Labor Act and its several amendments. Not one considers the possibility of extending coverage to discrimination in the hiring of employees.[1]

No case supports appellant's arguments. The two cases relied on by him are inapposite. *United States v. American Trucking Ass'n*, 310 U.S. 534 (1940), does indeed

[1] Subcommittee on Labor of the Committee on Labor and Public Welfare, U.S. Senate, *Legislative History of the Railway Labor Act, as Amended (1926 through 1966)* (1974).

stand for the proposition that "employee" is not a word of art, and, in statutes lacking particularized definition, it is not regarded by the courts as a word of definite content. However, where the term "employee" *does* receive a particularized definition, the clear language of that definition must govern. *Nashville, C. & St. L. Ry. v. Railway Employees Department*, 93 F.2d 340 (6th Cir.), *cert. denied*, 303 U.S. 649 (1937), also cited by appellant, does not expand the meaning of "employee" under the RLA; there the court speaks of the "particularity" with which Congress defined the term and proceeds to construe the phrase "in the service of a carrier" to include furloughed employees who have an obligation to return to work when called. *Id.* at 342. Such persons are different from those, such as appellant, who have never been in the employ of the carrier.

The statutes with which appellant compares the RLA are likewise inapposite because in each case Congress made clear its intent to cover applicants for employment by specific language referring to discrimination in hiring. *See* National Labor Relations Act, § 8(a), 29 U.S.C. § 158(a) (1982);[2] Federal Labor-Management and Employee Relations Act § 701, 5 U.S.C. § 7116(a) (1982). The difference in wording between those statutes and the RLA makes clear the more limited nature of the latter's coverage. While the National Labor Relations Act ("NLRA"), 29 U.S.C. § 141 *et seq.*, § 158(a) (1982), and the Federal Labor-Management and Employee Relations Act, 5 U.S.C. § 1701 *et seq.*, § 7116(a) (1982), protect

[2] The National Labor Relations Act, 29 U.S.C. § 141 *et seq.*, specifically excludes from its coverage employers subject to the RLA. 29 U.S.C. § 151(2).

prospective employees in their spheres of coverage, the RLA does not.

In some cases, the Supreme Court in interpreting the Railway Labor Act has borrowed from the NLRA or from general labor policy. *See, e.g., Electrical Workers v. Foust*, 442 U.S. 42 (1979); *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369 (1969); *Steele v. Louisville & N.R. Co.*, 323 U.S. 192 (1944). These cases, however, did not involve a conflict with the plain language of the RLA. Most recently, the Court's disallowance of punitive damages in unfair representation suits under the RLA, a ruling drawing on NLRA principles, did not conflict with any wording of the Railway Labor Act, *Electrical Workers v. Foust, supra*. Indeed, the Court has emphasized that "the National Labor Relations Act cannot be imported wholesale into the railway labor area" and that "[e]ven rough analogies must be drawn circumspectly," *Brotherhood of Railroad Trainmen, supra*, 394 U.S. 369, 383, an admonition that may permit borrowing in resolving statutory ambiguity but proscribes it where one statute contains a plain provision that the other does not.

We appreciate the fact that appellant's case may not be without equities. He alleges retaliation as a result of his legally conducted activities in flying for an airline engaged in a sharp labor dispute with the Air Line Pilots Association. However, Piedmont has done nothing to violate the RLA in refusing to hire appellant. We decline to tell a party relying on the plain meaning of legislation that the statute says something it does not. It is with the Congress, not the courts, that appellant must press his

case for statutory similarity. The policy expressed by Congress in other labor statutes with respect to non-discriminatory hiring is important in permitting workers to join or not to join unions without fear of compromising their future employment prospects. However salutary that policy may be, it is not expressed in the Railway Labor Act.

III

On cross-appeal, Piedmont urges us to award costs and attorney's fees against the National Right to Work Legal Defense Foundation, which prosecuted appellant's case. The district court found there was insufficient evidence to declare appellant's claim to be totally frivolous, unreasonable, or groundless under any statutory authority or to rule that the action was filed in "bad faith" under Federal Rule of Civil Procedure 11. We affirm.

Attorney's fees may be awarded against a losing party who has "acted in bad faith, vexatiously, wantonly, or for oppressive reasons," *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 258-59 (1975), a criterion that has come to be know as the "bad faith exception," and that may be applied to counsel as well as to litigants. *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 756 (1980). Appellant and his counsel were relying upon anti-discrimination provisions in hiring in other labor laws that were not dissimilar in purpose and scope to the RLA. Thus we cannot say the analogies were drawn with no "good faith argument for the extension, modification, or reversal of existing law." *Textor v. Bd. of Regents of North Ill. University*, 87 F.R.D. 751, 754 (N.D. Ill. 1980),

citing DR 7-102(A)(2) of the Code of Professional Responsibility. This language has been incorporated into the 1983 amendment to Rule 11. While the amendment seeks to "reduce the reluctance of courts to impose sanctions" for abuse of process,[3] we believe that the district court in this case, which was able to judge first hand counsel's conduct in the course of the action, should be accorded deference in its judgment. *See Nemeroff v. Abelson*, 704 F.2d 652, 656 (2d Cir. 1983).

We also decline to award Piedmont damages or costs under the "frivolous appeal" provision of Rule 38 of the Federal Rules of Appellate Procedure.[4] The single issue posed by appellant was one of statutory construction. As noted, the National Labor Relations Act, 29 U.S.C. § 141 *et seq.* (1982), and the Federal Labor-Management and Employee Relations Act, 5 U.S.C. § 7101 *et seq.* (1982) both contain clauses prohibiting discrimination in hiring based upon choices or activities relating to union membership. Appellant's attempt to extend the coverage of the RLA by analogy to these statutes was not frivolous in a case of first impression.

The judgment of the district court is

AFFIRMED.

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[3] J. Moore, *Federal Practice* § 11.01[4], citing Fed. R. Civ. P. advisory committee note (1984).

[4] FRAP 38 provides: "If a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee."

APPENDIX B

Memorandum Opinion and Judgment of the United States District Court for the Middle District of North Carolina

January 12, 1984

IN THE
UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF NORTH CAROLINA
WINSTON-SALEM DIVISION

LLOYD LEE NELSON, *Plaintiff*	)	
v.	)	No. C-82-821-WS
PIEDMONT AVIATION, INC., *Defendant*	)	

MEMORANDUM OPINION

GORDON, Senior District Judge

Introduction

This matter is before the Court initially on defendant Piedmont's motions to dismiss the complaint on the grounds (1) that the Court lacks subject matter jurisdiction and (2) that the complaint fails to state a claim upon which relief can be granted. Defendant Piedmont further moves to strike paragraphs 8, 9, 11, 12, 18, 19, 20, 22, 23 and 27 of the complaint as being immaterial, impertinent and irrelevant. Defendant Piedmont lastly moves that costs be taxed against the plaintiff, and that Piedmont recover attorney's fees from the National Right to Work Legal Defense Foundation, Inc. Plaintiff thereafter filed a response, and Piedmont filed a reply with a supplement update. Oral arguments on the motions were presented on November 22, 1983 in

Winston-Salem, North Carolina.

I. Factual Background

A brief summary of the facts reveals the following: The parties include Piedmont Aviation, Inc. ("Piedmont"), an alleged "carrier" within the meaning of § 151, First, of the Railway Labor Act,[1] and the plaintiff, a resident of Texas who sought and was denied employment as an air line pilot by Piedmont. Although not parties to this suit, the complaint also incorporates allegations against the Air Lines Pilot's [*sic*] Association International ("ALPA"), a labor organization which is the collective bargaining representative of Piedmont's air line pilots, and Captain Clarence E. Koone, a member of the ALPA and a Piedmont pilot. The allegations against ALPA and Captain Koone are the subject of the plaintiff's motion to strike.

In May 1977, ALPA commenced a labor strike against Wien Air Alaska ("Wien"), a regional air line, and most of the Wien air line pilots went on strike. Wien attempted to continue flight operations, however, and in the years 1978 and 1979 the plaintiff was hired as a replacement pilot for Wien during the Wien/ALPA strike. The strike was settled in January 1979 after the President of the United States intervened, and thereafter the plaintiff sought employment as a pilot with other air lines, including Piedmont . The plaintiff was granted an interview at

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[1] 45 U.S.C. § 151, First. In actuality, however, Piedmont is not a carrier within the meaning of Section 151, First, but is a "common carrier by air" as defined by 45 U.S.C. § 181. For the purposes of this Memorandum Opinion, however, such distinctions are not dispositive of the issues.

Piedmont's corporate office in Winston-Salem, North Carolina on July 31, 1979. The plaintiff arrived in Greensboro, North Carolina on July 30, 1979 for his job interview the next day, and was escorted by Captain Clarence E. Koone to Winston-Salem. During the limousine ride to their destination, the plaintiff engaged in conversation with Captain Koone concerning his replacement pilot duties during the Wien/ALPA strike. On the next day, the plaintiff was interviewed for an air line pilot position by Mr. Lester Ray Welch, Jr., Piedmont's Director of Personnel and Administration, and was informed that Piedmont would not be able to offer him employment. During a subsequent telephone conversation with Mr. Welch, the plaintiff was again informed that Piedmont would not be able to hire him.

The complaint alleges that Piedmont's failure to hire the plaintiff violated § 152, Fourth, of the Railway Labor Act (45 U.S.C. § 152, Fourth), since the refusal to hire the plaintiff was "solely because plaintiff was not a member of ALPA and had flown for Wien during a period of time when ALPA was on strike against the air line." See complaint, para. 29. Jurisdiction is premised on 28 U.S.C. § 1331 (federal jurisdiction), 28 U.S.C. § 1337 (Congressional act regulating commerce), and 28 U.S.C. §§ 2201 and 2202 (declaratory judgment). Plaintiff seeks a declaratory judgment, a permanent injunction, attorney's fees and costs, and a jury trial on all issues triable by a jury.

II. Motions to Dismiss

Section 152, Fourth, of the Railway Labor Act ("RLA")

provides as follows:

> Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter. No carrier, its officers, or agents shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in any effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: *Provided*, That nothing in this chapter shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization.

The plaintiff contends that Piedmont's failure to hire him constituted a violation of § 152 Fourth, of the RLA.

Piedmont's motion to dismiss counters, first, that this Court lacks subject matter jurisdiction, because the plaintiff as a mere applicant for employment has no rights under the RLA, which Act only covers carriers and their "employees." In addition, Piedmont also argues that § 152, Fourth, contains no restrictions upon a carrier's rights to hire its employees nor confers any right on the plaintiff to be hired. Accordingly, it is contended, the complaint fails to state a claim upon which relief can be granted as there is no allegation that Piedmont has denied the plaintiff any right conferred on him by the RLA.

A review of the specific language, purpose and legislative history of § 152, Fourth, of the RLA reveals that Piedmont's motions to dismiss should be granted. *See American Tobacco Co. v. Patterson*, _____ U.S. _____, 102 S.Ct. 1534 (1982) (which holds that statutory construction must necessarily be gleaned from the statutory language and legislative history of the Act of Congress in question). At the outset, the unambiguous language of § 152, Fourth, deals only with (1) the right of "*[e]mployees* . . . to organize and bargain collectively through representatives of their own choosing," and with (2) the duty of "carriers, its officers or agents" not to "deny or in any way question the right of its *employees* to join, organize or assist in organizing the labor organization of their choice." 45 U.S.C. § 152, Fourth (emphasis added). Other than the mere fact that § 152, Fourth, applies to carriers and their "employees" as defined in § 151, Fifth, (45 U.S.C. § 151, Fifth), or carriers by air and their "employees" as defined in § 181 (45 U.S.C. § 181), no statutory language is mentioned by the plaintiff which

would extend coverage of § 152, Fourth, of the RLA to include "applicants for employment." Thus, nothing in the plain meaning of § 152, Fourth, can be construed to make the provisions of the RLA applicable to a mere applicant for employment as opposed to an "employee," as defined under the Act.

Moreover, the plaintiff gains no support in the purpose or legislative history of § 152, Fourth, of the RLA for his proposition that non-employees are provided rights under the Act in regards to hiring by carriers. Section 151a, which amended the RLA in 1934, declares that the purposes of the RLA, including § 152, Fourth, are, among others,

> (1) ['t]o avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among *employees* or any denial, as a condition of employment or otherwise, of the right of *employees* to join a labor organization, . . . [and, (3)] to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules or working conditions. . . .

45 U.S.C. § 151a (emphasis added). The provisions of the Act and its purpose, therefore, establish that the RLA was only meant to cover carriers and their "employees," and "labor organizations" composed of carrier's employees, *see Virginia Railway Co. v. System Federation No. 40*, 300 U.S. 515 (1937), and the purpose of the Act does not encompass any restriction upon or regulation of a carrier's right to select its employees. Likewise, there is nothing in the legislative history of the

RLA which would support the plaintiff's claim that Piedmont's failure to employ him violates § 152, Fourth. In surveying the intent of Congress "to provide for the prompt disposition of disputes between carriers and their *employees* . . . ," H. R. REP. No. 606, 69th Cong., 1st Sess. 54 (1926) (emphasis added), the debates on the original Act in 1926,[2] and the amendments of 1934,[3] 1936,[4] and 1951,[5] reveal nothing suggesting any intent of Congress to restrict or regulate any rights of an applicant seeking employment with a carrier or carrier by air.

Plaintiff's attempts to characterize the statutory language and legislative intent of § 152, Fourth, of the RLA as being "broad enough" to impose a duty on carriers not to discriminate against applicants for hire on the basis of union or non-union membership or activity only serve to skew the issue at hand. See Plaintiff's Reponse, p. 2. The sole issue is whether or not the plaintiff, as an applicant for hire, can be considered an "employee" within the plain meaning of the Act, and the plaintiff finds no statutory or case law to support his contention that an applicant for employment is the same as an "employee" under the Act. See, e.g., 45 U.S.C. § 181. The RLA simply does not create as a protected class persons seeking employment by carriers. The only pro-

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[2] 44 Stat. 577-78; Public Law No. 69-257 (May 20, 1926). See H. R. REP. No. 606, 69th Cong., 1st Sess. 54 (1926).

[3] 48 Stat. 1185-1197; Public Law No. 73-442 (June 21, 1934). See H. R. REP. No. 9861, 73rd Cong., 2d Sess. 1008 (1934). See also House Comm. on Interstate and Foreign Commerce Report No. 1944, 73rd Cong., 2d Sess. 919 (1934).

[4] 49 Stat. 1189; Public Law No. 74-487 (April 10, 1936). See CONG. REC., 74th Cong., 2d Sess. 5038 (1936).

[5] 64 Stat. 1238-1239; Public Law No. 81-914 (January 10, 1951). See CONG. REC., 81st Cong., 2d Sess. 17,046 (1951).

tection afforded by the RLA to persons seeking such employment is afforded to all persons seeking such employment, whether union or non-union. No individual seeking employment by a carrier has to give up the right to join a union as a condition of employment, 45 U.S.C. § 151a, or has to promise to join or not to join a union, 45 U.S.C. § 152, Fifth. Otherwise, the RLA imposes no restraint upon the rights of carriers to select their employees, and, thus, this Court finds no support for the plaintiff's tenuous claim that Piedmont's failure to employ him violated § 152, Fourth, or any other provision, of the RLA. Accordingly, the Court concludes subject matter jurisdiction is lacking because the plaintiff, as a non-employee, has no perceivable rights under § 152, Fourth, of the RLA, which Act covers only carriers and their "employees."

Despite the fact that there is no existing statutory or case law support for a finding that an applicant for hire can be considered as an "employee" under the Act, the plaintiff further urges this Court to find, as a general policy matter, that Piedmont's decision to refuse to hire him because of his past non-union activities resulted in a "direct, coercive and influencing impact on the minority employees of Piedmont Airlines." Plaintiff's Response, at p. 9. In support of such an argument, the plaintiff cites one Circuit Court of Appeals' decision stating *in dictum* that the RLA could apply if an employer's policy regarding the selection of employees were to impair "the collective bargaining process," *see Beeler v. Chicago, R. I. and P. Ry. Co.*, 169 F.2d 557 (10th Cir. 1948), and attempts to draw an analogy to the National Labor Relations Act's statutory scheme of protecting non-employee super-

visors when an employer's conduct directed at the supervisor has a direct impact on the organizational rights of employees. *Cf.* 29 U.S.C. § et seq. (1976).

However, the plaintiff makes no allegations which tend to show how Piedmont's employee selection process actually has any impact on the collective bargaining process or the organizational rights of employees and unions at Piedmont. Furthermore, the complaint contains no allegations that Piedmont ever attempted to influence or coerce other employees regarding their decisions to join or not to join a union through the employee selection process. Even if such contentions were alleged, the Court doubts such a claim could be considered without including such necessary and interested parties as the union and other employees so affected. Therefore, in this regard, the plaintiff's allegations that Piedmont's failure to hire him violated § 152, Fourth, of the RLA fails to state a proper claim upon which relief can be granted.

Accordingly, for the foregoing reasons, the Court concludes that the defendant Piedmont's motions to dismiss for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted should be ALLOWED.

III. Other Motions

Piedmont further moves pursuant to Rule 12(f), Fed. R. Civ. P., to strike certain paragraphs of the complaint as being immaterial, impertinent and irrelevant. The matters which Piedmont moves to strike essentially relate to allegations regarding ALPA and a Piedmont/ALPA

pilot, Captain Clarence E. Koone, neither of whom is a party to this action. The plaintiff counters that the challenged paragraphs relate to the factual and legal theories of the plaintiff's case. However, as this Court has now ruled that the plaintiff finds no support for his claim that Piedmont's failure to hire him violated § 152, Fourth, of the RLA, Piedmont's motion to strike is thereby rendered moot, and, therefore, must be DENIED.

Piedmont lastly moves that this Court tax the costs of this action against the plaintiff, and award them attorney's fees from the National Right to Work Legal Defense Foundation, Inc. Although plaintiff's counsel concedes that this case of first impression was filed at the outside limit of the statute of limitations "in the hope that a case of some precendential value relative to this litigation would have been decided," see Plaintiff's Response, at pp. 14-15, the Court, nevertheless, does not find sufficient evidence showing that plaintiff's claim is totally frivolous, unreasonable or groundless under any statutory authority, *see Christianburg Garment Co. v.* EEOC, 434 U.S. 412, 422 (1978), or that it was filed under the "bad-faith exception." *See Aleyska* [*sic*] *Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 258059 [*sic*] (1975); *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 766 (1980). Accordingly, Piedmont's motion for attorney's fees is also DENIED.

CONCLUSION

In summary, therefore, Piedmont's motions to dismiss for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted will be

ALLOWED, Piedmont's motion to strike will be DENIED as being moot, Piedmont's motion for costs and attorney's fees will be DENIED, and this action will be dismissed with prejudice in a separate Order filed contemporaneously with this Memorandum Opinion.

/s/ Eugene A. Gordon

Eugene A. Gordon
United States District Judge

January 12, 1984

IN THE
UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF NORTH CAROLINA
WINSTON-SALEM DIVISION

LLOYD LEE NELSON, *Plaintiff*	)	
v.	)	No. C-82-821-WS
PIEDMONT AVIATION, INC., *Defendant*	)	

JUDGMENT

For the reasons stated in a Memorandum Opinion filed contemporaneously herewith, it is

ORDERED that the defendant's motions to dismiss are granted: the defendant's motion to strike is denied as being moot; the defendant's motion for costs and attorney's fees is denied; and the action is dismissed with prejudice.

/s/ Eugene A. Gordon
Eugene A. Gordon
United States District Judge

January 12, 1984

FILED
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CLERK

No. 84-1490

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

LLOYD LEE NELSON,

Petitioner,

v.

PIEDMONT AVIATION, INC.,

Respondent.

On Petition For A Writ Of Certiorari To
The United States Court of Appeals
For the Fourth Circuit

BRIEF FOR RESPONDENT, PIEDMONT AVIATION, INC., IN OPPOSITION TO PETITION

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30 pp

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LISTING REQUIRED BY RULE 28.1

The Respondent, Piedmont Aviation, Inc., in compliance with Rule 28.1 names Norfolk Southern Corporation, Norfolk, Virginia, which beneficially owns 17.8% of its common stock and may be deemed to be an affiliate.

I.

COUNTERSTATEMENT OF QUESTION PRESENTED

The question presented by the Petition for review is whether the Fourth Circuit erred in holding that the word "employee," as defined and used in the Railway Labor Act (RLA)[1/], does not include within its meaning an applicant for employment.

The Petitioner's statement of the question presented for review under the caption "Question Presented" on page -i- of the Petition begs the question because it assumes that the intent of Congress in enacting the RLA was different from that the Fourth Circuit found it to be.

1/ 45 U.S.C. §§ 151-188

II.

COUNTERSTATEMENT OF FACTS MATERIAL FOR CONSIDERATION OF THE QUESTION PRESENTED

The facts material to the consideration of the question presented for review are stated in the following sentence. Piedmont, whose pilots were represented by Airline Pilots Association, International (ALPA), declined to hire the Petitioner, who had recently flown as a replacement pilot during an ALPA strike on another airline, because of its concern that hiring him might adversely affect its flight operations.

All other facts recited in the Petitioner's "Statement of the Case" (Petition, pp. 5-9) are immaterial to any consideration of the meaning of the word "employee" as defined and used in the RLA.

III.

REASONS WHY A WRIT OF CERTIORARI SHOULD BE DENIED

A. The Decision of the Fourth Circuit is in Accordance with the Plain and Unambiguous Language of the RLA and is Consistent with its Legislative History

The Fourth Circuit decided that the meaning of the term "employee," as defined and used in the RLA, does not include an applicant for employment and that the RLA does not restrict the right of carriers to select its employees or proscribe discrimination in hiring. The Act contains two definitions of employee.

> The term "employee" as used herein includes every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission now in effect, and as the same

> may be amended or interpreted . . . .

45 U.S.C. 151, Fifth.

> All of the provisions of . . . this title are extended to and shall cover every common carrier by air . . . and every air pilot or other person who performs any work as an employee or subordinate official of such carrier or carriers, subject to its or their continuing authority to supervise and direct the manner of rendition of his service.

45 U.S.C. § 181.

The words "employee" and "employees" are used 156 times in the Act. At no place where either word appears would it make any sense to substitute for that word the words "an applicant for employment" and the Petitioner has not designated any place in the Act where the context would permit such substitution. It is plain from the entire language of the Act that its provisiors are designed to promote industrial peace between the

employer and the employed and are not designed to limit the right of carriers to initially select their work force.

The Petitioner does not cite or refer to any legislative history in support of his position that the Fourth Circuit erred in its decision.

In its opinion, the Fourth Circuit said:

> Nothing in the statutory language or the legislative history of the RLA (which extends to common carriers by air, 45 U.S.C. § 181) supports appellant's contention that applicants for employment are covered. The purpose of the statute is to establish the mechanics for collective bargaining between interstate carriers and their employees through freely selected representatives of both parties, Nashville, C. & St. L. Ry. v. Railway Employees Dept., 93 F.2d 340 (6th Cir.), cert. denied, 303 U.S. 649 (1937); see also Virginia Ry. Co. v. System Federation No. 40, 300 U.S. 515 (1937). . . .
>
> . . . .

> There are 1,381 pages of legislative history pertaining to the Railway Labor Act and its several amendments. Not one considers the possibility of extending coverage to discrimination in the hiring of employees.

Appendix A to Petition, pp. 4a and 5a.

B. Petitioner's Argument that Subsequently Enacted Labor Laws Change the Meaning of the RLA as Written is Inapt

The Petitioner concedes in his opening argument (Petition, p. 9) that the Fourth Circuit's decision is not "clearly erroneous" but argues that, even so, this decision should be reversed in order to harmonize the RLA, which contains no proscription of discrimination in hiring, with subsequently enacted labor laws, which do contain such proscription. The Petitioner thus seeks by his Petition an opportunity to invite this Court to insert in the RLA a provision which is not there because later

labor laws have it -- an invitation previously issued to and declined by the Court of Appeals.[2/] This argument that the meaning of the RLA as written has changed with the subsequent enactment of other labor laws has no support in law, logic or reason. The case the Petitioner cites in support of this argument, Fuller, The Case of the Speluncean Explorers, 62 Harv. L. Rev. 616 (1949) (Petition, p. 9) is an imaginary opinion in a murder case decided by the fictional

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2/ "[Petitioner] points to nothing in the statutory language or legislative history of the Railway Labor Act to support his claim to its protection. He refers us to not a single case where a court has interpreted the term 'employee' so expansively. Instead, he candidly invites us to participate in a creative exercise in statutory redraftsmanship. We decline that invitation and affirm the decision of the district court." Petition Appendix A (p. 3a).

Supreme Court of Newgarth in the year 4300 and is presumably of no present precedential value.

C. The Assumption and Assertion by Petitioner that Congress Intended by the RLA to Proscribe Discrimination in Hiring is not Supported by the Language of the Act, its Legislative History, Case Law or Reason

The Petitioner assumes in his statement of the Question Presented (Petition, p. -i-) and asserts throughout his argument (Petition, pp. 9-12) that when Congress enacted the RLA in 1926, it intended, without saying so, to cover applicants for employment. The Petitioner makes no attempt to support this assertion by the language of the Act, its legislative history or any case law.

The Petitioner arrives at the congressional intent he relies on in his Petition by supposing that in enacting

the RLA sixty years ago, Congress did not intend that sixty years later the RLA would be the only labor law that did not proscribe discrimination in hiring and that, therefore, sixty years ago Congress intended the RLA to proscribe discrimination in hiring, irrespective of its plain and unambiguous language to the contrary. This imaginary intent of Congress on which the Petitioner relies to show that the Fourth Circuit's decision was erroneous has no support from law, logic or reason.

D. The Fourth Circuit's Decision is not in Conflict with any Decision of any Federal Court

The Petitioner asserts unqualifiedly and in black letters on page 9 of the Petition that the Fourth Circuit's decision "Conflicts with Decisions of This Court and Other Courts of Appeal." The cases the Petitioner cites do not

support this assertion. No case cited deals with or mentions an applicant for employment.

Decisions of this Court Cited by Petitioner are not in Conflict with the Fourth Circuit's Decision

The Petitioner cites two decisions of this Court as being in conflict with the decision of the Fourth Circuit -- Pennsylvania R.R. v. Day, 360 U.S. 548 (1959) (Petition, p. 10) and Andrews v. Louisville & Nashville R.R., 406 U.S. 320 (1972) (Petition, p. 12). Neither Day nor Andrews conflicts with the decision of the Fourth Circuit. Neither involves an applicant for employment or hiring. Both deal with the jurisdiction of the National Railroad Adjustment Board to adjudicate claims arising out of collective-bargaining agreements.

Day held that the National Railroad Adjustment Board had exclusive jurisdiction over the claim of a retired railroad employee whose claim was for compensation under a collective-bargaining agreement for work done before retirement. The Court did not hold that the retired employee met the RLA definition of employee but held that a claim which arose under the RLA before he retired must be processed under the procedures provided by the Act. The Court made this plain by the following statement in its opinion.

> "There is nothing in the Act which requires that the employment relationship subsist throughout the entire process of administrative settlement. The purpose of the Act is fulfilled if the claim itself arises out of the employment relationship which Congress regulated." (Emphasis added).

360 U.S. at 551 and 552.

Andrews likewise involved the jurisdiction of the National Railroad Adjustment Board over claims arising out of a collective-bargaining agreement. It held that a person claiming to have been wrongfully discharged in violation of a collective-bargaining agreement must pursue his claim before the National Railroad Adjustment Board. The Court did not hold that a discharged employee met the RLA definition of employee but that claims arising under the collective-bargaining agreement while he did meet that definition had to be pursued in accordance with the provisions of the Act.

Day did not hold that the plaintiff was an employee after he retired, and Andrews did not hold that the plaintiff was an employee after he was discharged. Neither case held that the term

"employee" had any meaning other than as defined in the Act. Neither case is in conflict with the holding of the Fourth Circuit that an applicant for employment is not an employee.

Decisions of Courts of Appeal Cited by Petitioner are not in Conflict with the Fourth Circuit's Decision

The Petitioner cites two decisions of Courts of Appeal as in conflict with the decision of the Fourth Circuit, Air Line Pilots Association v. Alaska Airlines, Inc. 735 F.2d 328 (9th Cir. 1984) (Petition, p. 10) and Nashville, C. St. L. Ry. v. Railway Employees' Dept., 93 F.2d 340 (6th Cir.) (Petition, p. 11). Neither conflicts with the Fourth Circuit's decision.

Air Line Pilots Association v. Alaska Airlines, Inc., expressly following Day, held that a retired airline

pilot could pursue his grievance as to the correctness of his retirement benefits, which had accrued under the collective-bargaining agreement while he was in active service, under the arbitration provisions of the RLA. The retired pilot was not held to be an employee after his retirement but to be entitled, after his retirement, to enforce rights which had accrued while protected by the RLA by procedures afforded by the RLA.

Nashville, C. St. L. Ry. v. Railway Employees' Dept. held that furloughed employees, who retained seniority and were subject to recall, were entitled to vote in an election to determine the collective-bargaining agent for their craft. The effect of this decision is that employees who are laid off but retain their seniority and are subject to

recall pursuant to the collective-bargaining agreement do not lose their status as employees under the Act. This decision does not conflict with the Fourth Circuit's decision that a person merely seeking employment is not covered by the RLA.

None of the four Federal cases cited by the Petitioner suggests that a carrier has any liability under the RLA to a person it has never employed.

E. The Question Presented for Review is not in Doubt or Uncertain, and There is no Reason for This Court to Review it

The correct answer to the question presented is not in doubt or uncertain. The question is adequately settled by the plain and unambiguous language of the RLA and the definitive and explicit decisions of the District Court and the Fourth

Circuit. Excerpts from these decisions follow.

> The provisions of the Act and its purpose . . . establish that the RLA was only meant to cover carriers and their "employees," and "labor organizations" composed of carrier's employees, see Virginia Railway Co. v. System Federation No. 40, 300 U.S. 515 (1937), and the purpose of the Act does not encompass any restriction upon or regulation of a carrier's right to select its employees. Likewise, there is nothing in the legislative history of the RLA which would support the plaintiff's claim that Piedmont's failure to employ him violates § 152, Fourth. In surveying the intent of Congress "to provide for the prompt disposition of disputes between carriers and their employees . . .," H. R. REP No. 606, 69th Cong., 1st Sess. 54 (1926) (emphasis added), the debates on the original Act in 1926, and the amendments of 1934, 1936, and 1951, reveal nothing suggesting any intent of Congress to restrict or regulate any rights of an applicant seeking employment with a carrier or carrier by air. (Footnotes omitted).
>
> . . . .

> [T]his Court finds no support for the plaintiff's tenuous claim that Piedmont's failure to employ him violated § 152, Fourth, or any other provision, of the RLA. Accordingly, the Court concludes subject matter jurisdiction is lacking because the plaintiff, as a non-employee, has no perceivable rights under § 152, Fourth, of the RLA, which Act covers only carriers and their "employees."

Opinion of the District Court, Appendix B of the Petition (pp. 16a, 17a and 18a).

> Piedmont has done nothing to violate the RLA in refusing to hire appellant. We decline to tell a party relying on the plain meaning of legislation that the statute says something it does not. It is with the Congress, not the courts, that appellant must press his case for statutory similarity. The policy expressed by Congress in other labor statutes with respect to nondiscriminatory hiring is important in permitting workers to join or not to join unions without fear of compromising their future employment prospects. However salutary that policy may be, it is not expressed in the Railway Labor Act.

Opinion of the Fourth Circuit, Appendix A to Petition (pp. 7a and 8a).

IV.

THE PETITION FOR WRIT OF CERTIORARI PRESENTS AN APPROPRIATE INSTANCE FOR THE AWARD OF DOUBLE COSTS AGAINST PETITIONER PURSUANT TO RULE 50.7 AND THE REQUIREMENT PURSUANT TO 28 U.S.C. § 1927 THAT PETITIONER'S ATTORNEYS PERSONALLY SATISFY PIEDMONT'S COSTS, EXPENSES AND ATTORNEY'S FEES REASONABLY INCURRED IN RESPONDING TO THE PETITION

The Petitioner and his attorneys were fully advised by the reasoned and explicit opinions of the District Court and the Fourth Circuit that his claim was wholly without merit. Although the District Court found that the Complaint was not "totally frivolous"[3/] and the Fourth Circuit held that the appeal "was not frivolous in a case of first

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3/ Opinion of the District Court, Appendix B of the Petition (p. 20a)

impression,"[4/] both Courts held unequivocally that Petitioner's claim was groundless.[5/]

The basis of the contention in the Petition that the Fourth Circuit's decision was erroneous is an imaginary "intention of Congress" to proscribe discrimination in hiring in the RLA. The Petitioner's lawyers filed the Petition

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4/ Opinion of the Fourth Circuit, Appendix A of the Petition (p. 9a).

5/ "Nothing in the statutory language or the legislative history of the RLA (which extends to common carriers by air, 45 U.S.C. § 181) supports appellant's contention that applicants for employment are covered. The purpose of the statute is to establish the mechanics for collective bargaining between interstate carriers and their employees through freely selected representatives of both parties . . . . The statute defines an "employee" in clear language . . . ." Opinion of the Fourth Circuit, Appendix A of the Petition (p. 4a).

(Footnote continued on following page)

on the basis of that contention even though they were convinced "that Congress never considered the issue" of discrimination in hiring in connection with enacting the RLA. Petitioner's lawyers made the following statement in the Fourth Circuit:

> [I]n 1974 the Subcommittee on Labor of the Committee on Labor and Public Welfare, United States Senate, had the "Legislative History of the Railway Labor Act, as Amended (1926-1966)" bound into one 1381 page volume. Unfortunately, this

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(Footnote continued from preceding page)

> "[T]he RLA imposes no restraint upon the rights of carriers to select their employees, and, thus, this Court finds no support for the plaintiff's tenuous claim that Piedmont's failure to employ him violated § 152, Fourth, or any other provision, of the RLA. Accordingly, the Court concludes subject matter jurisdiction is lacking because the plaintiff, as a non-employee, has no perceivable rights under § 152, Fourth, of the RLA, which Act covers only carriers and their 'employees.'" Opinion of the District Court, Appendix B of the Petition (p. 18a).

> legislative history does NOT address the meaning of the term "employee" and more importantly it is COMPLETELY SILENT ON THE QUESTION OF DISCRIMINATION IN THE HIRING OF EMPLOYEES. After reading and re-reading the legislative materials one is left with the strong conviction that Congress never considered the issue.

Appellant's Opening Brief in the United States Court of Appeals for the Fourth Circuit in No. 84-1187(L) served on 16 May 1984, p. 10.

The fact that Petitioner's lawyers[6/] were convinced when they filed the Petition that "Congress never considered the issue" of discrimination in hiring compels the conclusions that they were also convinced that Congress could not have had any intention to proscribe

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6/ The attorneys for Petitioner were also the attorneys for the Appellant in the Fourth Circuit.

discrimination in hiring and that they filed the Petition convinced that it was without basis. The Petitioner's lawyers, by filing the Petition which they were convinced was groundless, unreasonably and vexatiously multiplied proceedings which already had progressed through the District Court and the Court of Appeals and exposed their client to taxation of double costs under Rule 50.7[7/] and exposed themselves to a requirement by this Court, pursuant to 28 U.S.C. § 1927,[8/] that they personally satisfy

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7/ Rule 50.7. "In an appropriate instance, the Court may adjudge double costs."

8/ 28 U.S.C. § 1927. Counsel's liability for excessive costs

"Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct."

the costs, expenses and attorney's fees reasonably incurred by the Respondent because of this conduct.

V.

CONCLUSION

The Respondent respectfully submits that the Petition for Writ of Certiorari should be denied and that this Court should tax double costs against the Petitioner and should require Petitioner's attorneys to personally satisfy the expenses and attorney's fees reasonably incurred by Piedmont in responding to the Petition.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

LLOYD LEE NELSON,

Petitioner,

v.

PIEDMONT AVIATION, INC.,

Respondent.

REPLY BRIEF ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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REPLY BRIEF ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner Lloyd Lee Nelson in this Reply Brief reiterates that:

THE FOURTH CIRCUIT'S DECISION IS IN CONFLICT WITH DECISIONS OF THIS COURT AND OTHER COURTS OF APPEAL.

In its opposition to certiorari, the respondent Piedmont Aviation ("Piedmont") attempts to distinguish or downplay the importance of the "conflicting" cases cited in the petition. While the petitioner concedes that the present case is one of first impression and that the cited cases do not address the rights or protections of "appli-

cants for employment" under the Railway Labor Act ("RLA"), the cited cases do demonstrate that this Court and other courts of appeal have broadly construed the statutory definition of "employee." *Pennsylvania R.R. v. Day*, 360 U.S. 548 (1959) ("retired" workers are employees); *Air Line Pilots Association v. Alaska Airlines, Inc.*, 735 F.2d 328 (9th Cir. 1984) (*same*); *Andrews v. Louisville & Nashville R.R.* 406 U.S. 320 (1972) ("discharged" workers are employees); *Nashville, C. St. L. Ry. v. Railway Employees Dept.*, 93 F.2d 340 (6th Cir.), *cert. denied*, 303 U.S. 649 (1939) ("furloughed" workers are employees); *Florida East Coast Ry.*, NMB Case No. R-212 (1936) (*same*); *Southern Pacific Lines*, NMB Case No. R-426 (1938) (*same*).

In each of these cases, the courts broadly construed the RLA's statutory definition of "employee" to ensure that substantial justice was done based on the implied intent of Congress. The Fourth Circuit's narrow, literal construction of the RLA's definition of "employee" is in sharp contrast; and, if allowed to stand, defeats the intent of Congress to forbid carrier discrimination against workers.

Justice Black's discussion of the meaning of "employee" in the *Day* case [360 U.S. at 555 (Black, J., dissenting quoted at page 10 of the Petition], is of particular importance. While serving as a U.S. Senator from Alabama, Justice Black voted in favor of the 1934 amendments to the RLA, including the amendments to Section 1 *Fifth* (definition of "Employee"), Section 2 *Third* (forbidding interference, influence, or coercion in the selection of representatives), Section 2 *Fourth* (forbidding carrier

interference with employee organizational rights), and Section 2 *Fifth* (forbidding coercion of APPLICANTS FOR EMPLOYMENT through the use of "yellow dog" contracts). Notwithstanding Justice Black's arguments in favor of a strict, literal interpretation of "employee," the Court in *Day* opted for the broader reading. A similar result is appropriate in this case.

A review of prior railway labor legislation indicates that the term "employee" has changed very little over the past eighty-seven (87) years. Congress initially defined railway employees in the Erdman Act of 1898, 30 Stat. 424 (1898), providing that [t]he term 'employee,' as used in this act, shall include all persons actually engaged in any capacity in train operation or train services of any description. . . ." The Erdman Act was also the first railway labor law to forbid employer discrimination by outlawing "yellow dog" contracts.[1] The Newlands Act of 1913, 38 Stat. 103 (1913) retained this same definition of "employee." Although the RLA of 1926 modified the definition to take into account the functions of the Interstate Commerce Commission, there appears to have been no legislative discussion regarding the meaning of "employee."

It should also be noted that this Court has cited the RLA as one of the statutes without a particularized definition of "employee." In *United States v. American Trucking Ass'n*, 310 U.S. 534, 548 n.29, the court stated "where the term 'employee' has been used in statutes without particularized definition it has not been treated

[1] This portion of the Act was later nullified by this Court in *Adair v. United States*, 208 U.S. 161 (1908).

by the courts as a word of definite content." 310 U.S., at 548 n.29. The Court went on to state:

> There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning. When that meaning has led to absurd or futile results, however, this Court has looked beyond the words to the purpose of the act. Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole' this Court has followed that purpose, rather than the literal words. When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.'"

Id. at 543-44 (Footnotes omitted). *See also United Steelworkers v. Weber*, 443 U.S. 193, 202 (1979); *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564 (1982). A broad interpretation of "employee" best effectuates the purposes of the RLA.

Although there was no significant change in the definition of "employee" from 1898 to 1934, Congress did take actions to ensure that unscrupulous carriers did not discriminate against railway workers because of their union or non-union beliefs. Of particular concern to Congress was the prevalence of "closed shops" and "company unions" used by carriers to deny railway workers their

right to freedom of association. In 1932 Congress declared "yellow dog" contracts to be against federal labor policy and repudiated them as a basis for legal or equitable relief in federal courts. 47 Stat. 70 (1932), 29 U.S.C. § 103. The 1934 amendments to the RLA outlawed both the "closed shop" and "yellow dog" contracts. 48 Stat. 1186 (1934), 45 U.S.C. § 152 *Fourth* and *Fifth*. There is ample legislative support for the proposition that Congress restricted the carriers' right to discriminate against workers because of the union or non-union beliefs.

It is respectfully submitted that the Fourth Circuit's decision, if allowed to stand, will undermine almost ninety years of progress in railroad and airline labor relations. A narrow, literal reading of the term "employee" will effectively deprive workers of the protections of the Act. An unscrupulous carrier, by pre-screening applicants for employment regarding their pro- or anti-union feelings, can completely negate the protections of the Act.

A writ of certiorari should issue.

THE ISSUE IN THIS CASE INVOLVES AN IMPORTANT QUESTION OF LAW.

In 1958, Associate Justice Harlan, in addressing the Bar of the City of New York, stated:

> The test of 'special and important reasons' for certiorari in nonconflict cases is not so susceptible of more or less exact statement. In this area the concept is a flexible one which will vary with chang-

> ing circumstances. I think that all that can be usefully said here on this score is to emphasize against something that cannot be too often repeated, namely, that it is the effect of the decision upon the 'exposition and enforcement' of the law, rather than its impact upon the parties in a particular case, that lies at the heart of the matter.

Harlan, *Manning the Dike,* (1958) (Eighteenth Annual Benjamin N. Cardozo lecture to the Association of the Bar of the City of New York). The importance of this case cannot be overestimated. Some one million workers are employed in the recently deregulated railway and airline industries. As carriers struggle to carve out niches in the suddenly competitive markets, there is a very great likelihood that some carriers will attempt to gain a competitive edge by denying workers their right to freedom of association.

This case offers the Court an excellent vehicle for ensuring that the will of Congress is carried out. A broad interpretation of the statutory definition of "employee" will ensure that railroad and airline workers enjoy the labor law protections Congress intended.

A writ of certiorari should issue.

CONCLUSION

For the reasons set forth in the petition and this reply brief, it is respectfully submitted that a writ of certiorari should issue and the case be set for plenary review.

Respectfully submitted,

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